IN THE

SUPREME COURT OF THE UNITED STATES

JUNE TERM, A. D. 1923.

No. ~~1118~~ 354

THOMAS A. DELANEY,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals and Brief in Support Thereof.

LAURENCE M. FINE,
Attorney for Petitioner.

CHAMPLIN LAW PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States

JUNE TERM, A. D. 1923.

No.

THOMAS A. DELANEY,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals and Brief in Support Thereof.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Thomas A. Delaney, respectfully represents that on the 26th day of October, A. D. 1921, there were two indictments, Numbers 348 H and 350 H, filed with the clerk of the United States District Court for the Eastern District of Wisconsin, charging the petitioner with the commission of various offenses and with the crime of conspiracy against the laws of the United States jointly with co-conspirators therein named, as follows:

Indictment Number 348 H charges your petitioner jointly with Joseph Guidice, Joseph Dudenhoefer, Sr., Joseph Dudenhoefer, Jr., and Joseph Dudenhoefer Company, a corporation, with a conspiracy to violate the laws of the United States to wrongfully and unlawfully purchase, transport, possess, barter, sell and deliver intoxi-

cating liquor for beverage purposes in violation of the National Prohibition Act, and to wrongfully make and cause to be made records, reports and affidavits in furtherance of such unlawful conspiracy.

Indictment Number 350 H charges your petitioner jointly with Walter Burke, Joseph Ray, Joseph Guidice, Joseph Dudenhoefer, Sr., Joseph Dudenhoefer, Jr., and Joseph Dudenhoefer Company, a corporation, with similar offenses, in practically identical words and terms covering the same period of time.

The overt acts in Indictment 348 H charge your petitioner with having received from Joseph Guidice, a coconspirator, at divers dates and times, large sums of money. Overt acts in Indictment 350 H make similar charges and charge also that your petitioner and Joseph Guidice had conversed and conferred with each other respecting unlawful transactions in intoxicating liquors.

Your petitioner further represents that for convenience the two indictments against him were consolidated and that he was put on trial on March 6, 1922, before Honorable Ferdinand A. Geiger, one of the judges of the said District Court, and a jury, and that on March 10, 1922, the jury returned a verdict of guilty on each of the aforesaid indictments.

Your petitioner further represents that thereafter, on April 5, 1922, a motion for a new trial was made in behalf of your petitioner, and that the same was on that day overruled; and that thereafter, on April 20, 1922, it was ordered that for the purpose of judgment and sentence, cases numbers 348 H and 350 H be considered as one case, and then and there sentenced your petitioner that he be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term of two years, and to pay a fine of $10,000.

Your petitioner further represents that thereafter he sued out his writ of error directed to the said District Court and seeking to review and set aside said judgment and sentence, and that proceedings upon error came on for hearing on January 30, 1923, before the United States Court of Appeals for the Seventh Circuit, which said court was composed of Francis E. Baker, as presiding justice, and Judges George T. Page and Evan A. Evans, as associate justices. That thereafter on February 6, 1923, a judgment was rendered by the said United States Court of Appeals, affirming the judgment and sentence as ordered on April 20, 1922; and that thereafter, on March 19, 1923, a petition for rehearing of the said cause to the United States Circuit Court of Appeals constituted as aforesaid, was denied.

Thereupon your petitioner suggested to his Honor, Judge Francis E. Baker, Chief Justice of the said United States Circuit Court of Appeals, his desire to file a motion in that court seeking to set aside and vacate judgment and orders of said court on the ground that one of the justices constituting said court was disqualified from sitting as such associate justice of said court under section 20 of the Federal Code, in the Statutes of the United States. Whereupon, a rule was entered upon this petitioner to file motion and printed brief in support thereof, and a further rule on the respondent to file a reply brief thereafter and a further order was entered that the said motion shall come for hearing on May 1, 1923. Thereupon the petitioner complied with the rule and order so entered upon him by presenting and filing certified copy of the record showing that Judge Evans participated in hearing of motion and entering orders in the court below, also a verified petition setting forth that the said Judge Evans partook in the deliberations upon the penalty to be inflicted upon petitioner; and on the said May 1,

1923, appeared before the said United States Circuit Court of Appeals and presented his said motion, which was then and there denied.

For the purpose of this petition, your petitioner humbly prays the consideration of this court of but three propositions involved in this cause:

First. Petitioner was denied his right to be confronted by the witnesses against him as provided in Article 6 of Amendment of the Constitution of the United States of America.

Second. The hearing on appeal in this cause was before a court constituted in violation of section 120 of the Federal Code, in the Statutes of the United States, which provides:

> "That no judge before whom a cause or question may have been tried or heard, in a District Court, or existing Circuit Court, shall sit on trial or hearing of such cause or question in the Circuit Court of Appeals."

Third. That there was such a complete failure of proof as to amount to a loss of jurisdiction of the trial court.

First Proposition.

No witnesses were produced who testified to anything of their own knowledge respecting any of the overt acts charged against petitioner.

Joseph Guidice, a co-conspirator, who it is charged in the overt acts had delivered money to this petitioner, had died before the trial. The sole testimony touching the overt acts charged against petitioner was that Joseph Dudenhoefer, Sr., and Joseph Dudenhoefer, Jr., confessed co-conspirators, and one Sherman G. Spurr. The testimony of Joseph Dudenhoefer, Sr., is solely as to

what Guidice had made him believe and what Guidice had said and what his son, Joseph Dudenhoefer, Jr., had said Guidice had said. Joseph Dudenhoefer, Jr., also testified as to what Guidice had told him and what another co-conspirator, Walter Burke, had told witness that petitioner had said. Government witness Spurr testified that he was in the investment bond business and that Guidice had bought from said witness Spurr liberty bonds of the face value of $17,000 and other bonds of the face value of $11,000. This the government attempted to show was with the money supposed to have been given to petitioner by Guidice.

This witness Spurr, further testifies that (Tr. 106), "he (Guidice) rather gave me to understand he was buying them for somebody else," and as to what led the witness to such an inference, he testifies that what Guidice (since deceased) had said was (Tr. 105), "He passed it off in a peculiar way—I do not know if there was any direct statement made." And further, what Guidice said was (Tr. 105), "not anything of any serious nature; it was more of a kidding nature." That is to say, when Guidice told the witness, "in a kidding nature," that he was buying the bonds for "someone else," the inference is that he was buying them for the petitioner. It is noteworthy that no testimony was offered touching other overt acts charged against this petitioner. The sole testimony goes to the overt act charging the petitioner with having received money from Guidice. Both Dudenhoefer, Sr., and Dudenhoefer, Jr., testify that Guidice had told them and had made them believe that he had delivered money to petitioner, and particularly Dudenhoefer, Jr., testifies as to the time and place such deliveries of money to petitioner by Guidice were made. Yet government witness Spurr gives *direct* evidence that Guidice bought bonds with the money supposed to have been paid to peti-

tioner, which is further corroborated by Plaintiff's (Government's) Exhibits 36, 37, 38 and 39. Petitioner desires to avoid any discussion of the evidence, excepting to point out the remarkable failure of proof and the fact that petitioner was denied his constitutional right to be confronted by witnesses against him.

SECOND PROPOSITION.

The prosecution of the petitioner is one of a series known as the *Wisconsin Conspiracy* cases, involving some twenty defendants, and arising from interrelated facts, circumstances and overt acts in which it was charged the petitioner was involved and implicated. The said Arthur Birk was placed upon trial before Honorable Evan A. Evans, one of the judges of the said District Court, in the Eastern District of Wisconsin, and a jury, and on April 12, 1922, a verdict was rendered finding the said Arthur Birk guilty as charged. During the said trial the name of your petitioner was repeatedly mentioned in a prejudicial manner.

On the 12th day of November, 1921, counsel for Walter M. Burke filed a motion to quash indictment number 350 H, which said indictment was found against your petitioner and Walter Burke and others jointly, and it being one of the indictments upon which petitioner was subsequently tried. Said motion came on for hearing on December 17, 1921, before the said Honorable Evan A. Evans, who heard and considered arguments of counsel upon said motion, and thereafter on December 22, 1921, the said Judge Evan A. Evans denied said motion.

Thereafter, on or prior to the 20th day of April, 1922, and prior to the imposition of sentence upon petitioner, this petitioner is informed and believes, the said Judge Evan A. Evans sat with other District Judges, to wit:

Judge Ferdinand A. Geiger and Judge Albert B. Anderson, each of whom had presided at the trials of the respective defendants named in the aforesaid indictments, including the trial of petitioner, and conferred and deliberated upon the penalties to be inflicted upon petitioner. On the said 20th day of April, 1922, at the hour of 10:45 a. m., the aforesaid District Judges, after opening of court in the court room presided over by Judge Geiger, who was the presiding judge at the trial of petitioner, proceeded to and did each pronounce sentence respectively upon the several defendants including petitioner.

The said Judge Evan A. Evans, after having presided at the trial of Arthur Birk as aforesaid, and after having heard, considered and denied a motion to quash indictment 350 H upon which, consolidated with indictment number 348 H, petitioner was tried, and after having, as petitioner is informed and believes, participated in the deliberations as to the penalty to be inflicted upon petitioner, is the same judge who was one of the justices in the United States Circuit Court of Appeals sitting in review of the appeal of your petitioner.

THIRD PROPOSITION.

The record reveals a total failure of proof of the existence of a conspiracy involving petitioner. The government offered no other testimony relating to a conspiracy other than the hearsay evidence of Dudenhoefer, Sr., and Dudenhoefer, Jr., that they had been told or made to believe by Guidice, months prior to his decease, that the said Guidice had made deliveries of money to petitioner. This testimony was followed by *direct* evidence of government witness Spurr that Guidice, contrary to his statements to the Dudenhoefers, had bought bonds with a large portion of the money he had professed to have delivered to petitioner; but that, "in a kidding

nature'' Guidice had intimated he was buying the bonds for ''someone else.'' It is the contention of the government that ''someone else'' was the petitioner.

Petitioner therefore humbly prays that a writ of *certiorari* issue, directed to the said Circuit Court of Appeals of the United States for the Seventh Circuit, directing it to certify to this court all the proceedings that took place before it, and all of the evidence that was offered before it in said proceedings, for review and determination by this court.

Petitioner further prays for an opportunity to present oral argument in support of his petition; and humbly suggests to the court the propriety of issuing a writ of *certiorari* in this cause, for many potent reasons, among which are:

1. Petitioner was denied his right to be confronted by witnesses against him.

2. His appeal was heard before a court constituted contrary to the Statutes of the United States.

3. Because the government's evidence seldom rose even to the dignity of hearsay evidence, but consisted of rumor, gossip and loose speculation.

4. Because there being a total failure of proof as to guilt a grave injustice has been done.

And your petitioner will ever pray.

Laurence M. Shine

.....

.....

Counsel for Petitioner.

State of Illinois, }
County of Cook. } ss.

Laurence M. Fine, being first duly sworn, says that he is the attorney for the petitioner herein, that he has read the foregoing petition, and that the same is true to the best of his knowledge, information and belief.

Laurence M. Fine

Subscribed and sworn to before me this 19th day of May, A. D. 1923.

Robert D. Mollick

Notary Public.

BRIEF AND ARGUMENT.

Thomas A. Delaney was appointed Prohibition Commissioner in November, 1919, when he was about 33 years of age. He was the first prohibition director of that district. A resident of Green Bay, Wisconsin, since he was nine years old. He was in charge of the PERMISSIVE BRANCH of the department (Tr. 129). There was also an Enforcement Branch over which Delaney had no jurisdiction (Tr. 136). His post of duty was Green Bay (Tr. 137), where he spent half of his time, spending the balance of his time in Milwaukee, excepting when he was engaged in propaganda work (Tr. 132).

After taking office Delaney became acquainted with the Dudenhoefers, who were "among the largest sacramental wine dealers in the west." O'Neill, a co-appointee, Chief Inspector of the Prohibition Department, prior to his appointment had been an employe of the Dudenhoe-

fers for fifteen years (Tr. 75). Guidice and Burke were acquainted with Delaney through their activity in Democratic politics. Ray was a prohibition inspector.

The illegal liquor deals were accomplished by the use of forms number 1410. Legitimately, these forms, in triplicate, were given to a vendee who would make a verified application to purchase, then have the same approved by the Prohibition Department, leaving the original with that department, retaining one copy and giving the distillery the third copy (Tr. 130). THESE APPROVALS WERE MADE BY CLERKS WITH A RUBBER-STAMP SIGNATURE OF THE DIRECTOR (Tr. 130).

The Dudenhoefers testified they had paid almost $100,000 to Guidice for such "coverage permits" (blank forms 1410 bearing rubber-stamp signature of Delaney) and that Guidice told them that he had obtained these permits NOT FROM DELANEY but from Burke, then, when Burke's price was too high (Tr. 80) from Ray. Dudenhoefer, Jr., testifies that he went to Chicago and bought two fictitious notarial seals for the purpose of verification on the false permits. The record is silent as to the part Delaney took or was supposed to take in these transactions.

The government's case against Delaney is based upon evidence of his friendship with Burke, Guidice and the Dudenhoefers. Letters were introduced (plaintiff's 31, 32, 33, 34 and 14) showing the intimate friendship between Delaney and Dudenhoefers, and from these letters and other evidence it appears that Delaney made incessant effort in their behalf in a matter affecting the life of their very large and lucrative business. Attorneys for the government enlarge upon that situation, and point to it in large type on page 24 of their brief in the Circuit Court of Appeals. The government, however, overlooks the fact that for such perfectly lawful service De-

laney neither asked nor received compensation; and that Dudenhoefers, despite the friendship, and the frequent meeting during the progress of the unlawful deals, never by word, hint or gesture, suggested or intimated to Delaney anything regarding them, nor did they seek to learn if he received the money supposed to be given him by Guidice.

From the testimony it does not appear that Delaney was a necessary party to the conspiracy; and raises an inference that the supposed friendship of these parties to Delaney was with a design to direct Delaney's attention away from the illegal traffic.

I.

The right of confrontation, secured by the Sixth Amendment, is a constitutional immunity which cannot be legally denied one accused and tried in the Federal Courts.

South Dakota v. *Hefferman*, 25 L. R. A. (N. S.) 868.
Reynolds v. *United States*, 98 U. S. 145.
Motes v. *United States*, 178 U. S. 471.
Dowdall v. *United States*, 221 U. S. 325.
Diaz v. *United States*, 223 U. S. 442 (p. 450).
Kirby v. *United States*, 174 U. S. 47.

(a) And such right must be exercised in the presence of a court having the power to secure the privilege of cross-examination.

People v. *Murray*, 89 Mich. 276.
Ralph v. *State*, 124 Georgia 81.
State v. *Hefferman*, 25 L. R. A. (N. S.) 876.
2 Wigmore on Evidence, Sec. 1365.

(b) Constitutional provisions should be liberally construed and courts should be watchful for the fundamental rights of the citizen.

Boyd v. *United States,* 116 U. S. 616.

(c) Denial of a constitutional right or immunity will render proceeding a nullity.

In re Hans Nielsen, 131 U. S. 176.

(d) Where the right to cross-examine is extended under circumstances plainly making it impossible to avail of its full benefits, it is in effect denied.

Wray v. *State,* 154 Ala. 36, 15 L. R. A. (N. S.) 493.

Where the physical condition of a witness, called and examined by the state, is such, by reason of extreme illness, as to make it probable that a cross-examination would result in his death, the defendant is justified in refraining from any attempt to cross-examine, although the opportunity is offered by the trial court, and the denial of the defendant's motion to strike out the evidence is reversible error.

(e) The courts cannot suspend nor deny the right of the citizen to any constitutional immunity.

Ex parte Milligan, 4 Wallace, 2.

(f) Where one is deprived of his liberty, from an excess of judicial power, the result is a lack of jurisdiction.

In re Hudgings, 249 U. S. 378.

The record in this cause discloses a flagrant violation of a citizen's right to be confronted with the witnesses against him. Delaney was accused and convicted upon the most palpable hearsay. The right of confrontation is recognized in every state constitution as well as the Federal constitution. It is not a mere idle form which is secured by the organic law of the land, but a real right,

which courts are powerless to withhold. The first ten amendments, collectively regarded as a bill of rights, were adopted because the people of the nation demanded security of the highest order for these rights. Not the least of the rights secured is the right to be confronted with the witnesses accusing. The rights thereby secured are the rights which our ancestors had, through suffering, finally come to enjoy, and which they did not propose should rest upon an insecure foundation. They were declared, then, to be constitutional rights, and, as such they should be jealously guarded and protected by the courts.

The right of confrontation demands that the accused shall have the opportunity to cross-examine his accuser. This is the essence of the right. Deprived of the right to cross-examine the accusing witness, an accused person is, in effect, condemned upon an *ex parte* proceeding.

It is well known that frequently a decisive moral effect results from the mere appearance of a witness in open court, and a defendant is entitled to the full benefit of such moral effect as may appear upon a cross-examination of the witness.

An eminent former justice of this court spoke of the Sixth Amendment as conferring "among the most important rights which are guaranteed by the constitution to a person charged with offences against the United States." He then speaks of the right to be confronted with the witnesses against him and says this means that "no evidence shall be brought against him on his trial made up of depositions, or affidavits, or hearsay statements, but that the witnesses by whom his guilt is to be established shall be brought face to face with him in order that he may see them and hear them, witness their manner of testifying, and so that either by himself or his

counsel they may be subjected to such cross-examination as he may consider of benefit to his interests."

Mr. Justice Miller on the Constitution (pp. 508 and 509).

The case of *Kirby* v. *United States*, 174 U. S. 47, involved the question as to an accused's right to be confronted with the witnesses. A Federal statute purported to make a judgment of conviction against the principal felons evidence against a person charged with receiving stolen property.

The defendant was convicted and appealed, complaining that he had been denied his right to be confronted with the witnesses against him. This court reversed the conviction and said:

> "One of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be confronted with the witnesses against him. Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the result of the trial of the principal felons was undoubtedly evidence, as against them, in respect of every fact essential to show their guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offence, for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of the innocence of an accused at-

> tends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt. * * * But that presumption in Kirby's case, was in effect held in the court below to be of no consequence; for, as to a vital fact which the government was bound to establish affirmatively, he was put upon the defensive almost from the outset of the trial by reason alone of what appeared to have been said in another criminal prosecution with which he was not connected and at which he was not entitled to be represented" (pp. 55, 56).

In *Boyd* v. *U. S.*, 116 U. S. 616, this court considered certain provisions of the revenue laws and held them to violate the Fourth and Fifth Amendments and said that unconstitutional practices get their first footing "by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In *Dowdell* v. *U. S.*, 221 U. S. 325, the substance of the Sixth Amendment (as embodied in the Philippine Bill of Rights) was considered. The court said:

> "This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits,, and particularly to preserve the right of the accused to test

the recollection of the witness in the exercise of the right of cross-examination" (p. 330).

See

Mattox v. *U. S.*, 156 U. S. 237.
Kirby v. *U. S.*, 174 U. S. 47.
Wigmore, V. 2, 1396-1397.

In *Motes* v. *U. S.*, 178 U. S. 458, the defendants were charged with a conspiracy to injure a citizen in the exercise of his rights. Taylor, a defendant, at preliminary hearing testified and his evidence was reduced to writing and signed by him. At the trial Taylor disappeared, just before the case was called. The written evidence of Taylor was sufficient, if accepted, to establish guilt of all defendants.

The other defendants had a chance to cross-examine at the preliminary hearing. (See pp. 470, 471.) The court notes that, at time of Taylor's statement, there had been no proof of a conspiracy (p. 471).

The court held the admission of Taylor's statement to be a violation of the accused's rights to be confronted with the witnesses, citing Cooley Const. Lim., Sec. 218.

II.

Judge Evans could not legally sit in the Court of Appeals and its judgment, as a result, is void.

Regina v. *The Justices*, 6 Queens Bench 753.
Queen v. *Justices*, 18 Q. B. 416.
Oakley v. *Aspinwall*, 3 N. Y. 547.
American Construction Co. v. *Jacksonville*, 148 U. S. 372.
Cramp v. *International Co.*, 228 U. S. 645.
Rexford v. *Brunswick*, 228 U. S. 339.
Moran v. *Dillingham*, 174 U. S. 153.
People v. *Connor*, 142 N. Y. 130.
Van Arsdale v. *King*, 152 N. Y. 69.

The verified petition of Delaney, presented to the Court of Appeals (and incorporated in the transcript of the record), set forth facts, not disputed, from which it appeared that Mr. Justice Evans sat in the trial court in the consideration of matters closely related to the facts involved in the charges against Delaney. In fact, Judge Evans took part in the deliberations which resulted in the fixing of the penalties awarded the convicted persons, including Delaney. He thus became disqualified to sit in a court of review; and his disqualification became absolute, because of the prohibition of a Federal Statute, and could not depend upon any circumstances from which a waiver could be implied.

Judge Evans also heard, considered and adjudicated a motion to quash Indictment 350 H. Had Judge Evans granted the motion to quash, it would have had the effect of adjudicating the cause as to all defendants named in the indictment. The denial of said motion, likewise, was an adjudication.

Petitioner was condemned by a court constituted in direct violation of a statute, mandatory in character. The language of this court in *McClaughry* v. *Deming*, 186 U. S. 49, in discharging upon habeas corpus one convicted by a court-martial, is very significant. It was held that the court-martial was constituted in violation of law, and therefore, had not the power to convict. It was said:

> "It was therefore in law no court. The men were disqualified to act as members thereof, and no challenge was necessary, for there was no court to hear and dispose of the challenge. It is unlike an officer who might be the subject of challenge as under some bias. A failure to challenge in such a case might very well be held to waive the defect, and the officer could sit and the finding of the court be legal."
>
> "But this is not the case of a personal challenge of some member of the court where an objection to his

> sitting might be thus particularly raised. It is an objection that the whole court as a court was illegally constituted because in violation of the express provision of the statute, and the challenge to the whole court is not provided for by the statute. But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the question of invalidity. We are not of that opinion. It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. This consent could no more give jurisdiction of the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women. The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law. This consent had no effect whatever in the face of the statute, which prevented such men sitting on the court. The law said such a court shall not be constituted, and the defendant cannot say it may, and consent to be tried by it, any more than he could consent to be tried by the first half a dozen private soldiers he should meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial" (pp. 65, 66).

This court then refers to the opinion in the leading case of *Oakley* v. *Aspinwall*, 3 New York 547, approved the principle there announced, and said:

> "A judge who is prohibited from sitting by the plain directions of the law, cannot sit, and the consent that he shall sit gives no jurisdiction. This is the doctrine of the above case. It has been followed without doubt or hesitation in the State of New York ever since its rendition in 1850" (p. 68).

In *Cramp* v. *International Curtiss Co.*, 228 U. S. 645, Section 120 of the Judicial Code which prohibits a judge sitting in trial court, from sitting on hearing in court of

appeal, was considered and it was held reversible error, although the trial judge merely entered a *pro forma* decree, without consideration of the matter.

Rexford v. *Brunswick*, 228 U. S. 339, is to the same effect. Here the attorney for a party stated there was no objection to the trial judge sitting.

See also:

Am. Const. Co. v. *Jacksonville*, 174 U. S. 153.
Slater v *Willegs*, 16 App. D. C. 369.
Moran v. *Dillingham*, 174 U. S. 153.

In *Am. Const. Co.* v. *Jacksonville*, 148 U. S. 372 the trial judge sat in review. The Supreme Court said:

> "The more important suggestion is that the decree of the Circuit Court of Appeals is void, because Judge Pardee took part in the hearing and decision in that court, though disqualified from so doing by Section 3 of the Judiciary Act of 1891, which provides that 'no justice or judge, before whom a cause or question may have been tried or heard in the Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals.'
>
> "The question whether this provision prohibited Judge Pardee from sitting in an appeal which was not from his own order, but from an order setting aside his order, is a novel and important one, deeply affecting the administration of justice in the Circuit Court of Appeals. If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or by certiorari."

The sitting by Judge Evans in the Court of Appeals, after having participated in some of the proceedings in the court below, was a mistake. "Such mistakes are not uncommon," said the New York Court of Appeals (*Van Arsdale* v. *King*, 152 N. Y. 69). "But litigants,

particularly persons charged with crime, have a right to have their case determined by a court constituted according to law."

The Court of Appeals has only the jurisdiction conferred by statute. "The Circuit Court of Appeals is a court created by statute and is not endowed with any original jurisdiction" (*ex parte Craig*, 282 Federal, 138, p. 143). Its jurisdiction was, therefore, strictly limited and placed squarely under the prohibition that no judge having heard a cause in the trial court, or "a question" arising therein, could sit in the court of review. The power of decision, in other words, was withheld from him, and effectually denied him. The Court of Appeals had no authority to render any judgment. The accused was protected by an express, mandatory provision of the statute, which denied judicial power to Judge Evans, while sitting in the Court of Appeals. Within the meaning of the opinion in *ex parte Nielsen*, 131 U. S. 176, "he was protected by a constitutionel provision, securing to him a constitutional right. It was not a case of mere error in law, but a case of denying to a person a constitutional right; and where such a case appears on the record, the party is entitled to be discharged from imprisonment. * * * A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. * * * In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the constitution, which bounds and limits all jurisdiction."

III.

The finding of guilty, not based upon any legal evidence, is manifest error, calling for reversal.

In re Watts, 190 U. S. 1 (p. 35).
Hyde v. *Stine*, 199 U. S. 85.
Tinsley v. *Triat*, 205 U. S. 20.
Chin Yow v. *U. S.*, 208 U. S. 8.
Kwock Jan Fat v. *White*, 253 U. S. 454.
Ex parte Craig, 282 Federal, 138 (p. 154).

(a) The admitting hearsay evidence was highly prejudicial to defendant.

Logan v. *United States*, 144 U. S. 263.
Brown v. *United States*, 150 U. S. 98.
Sorenson v. *United States*, 143 Federal, 821.
Leady v. *United States*, 280 Federal, 864.
Heard v. *United States*, 225 Federal, 829.
Harrington v. *United States*, 267 Federal, 97.
Heaton v. *United States*, 280 Federal, 697.

(b) This court will reverse, in a case of this character, although formal objection to harmful evidence may be considered as not properly made.

Crawford v. *United States*, 212 U. S. 183.
Clyatt v. *United States*, 197 U. S. 207.
Wiborg v. *United States*, 163 U. S. 633.
Weems v. *United States*, 217 U. S.

(c) A state of proof consistent with innocence demands a reversal.

The record may be searched in vain for any direct evidence tending to implicate Delaney in guilt. Rumor and idle gossip have wrought the ruin of an innocent man and only the action of this court can, in a measure, restore to him the priceless boon of freedom. There is a

total failure of proof to show guilt. The result would be grotesque if it were not so tragic to a man who has been made the victim of misguided official zeal upon the the part of the Federal officials.

In the case of *ex parte Craig*, 282 Fed. 138 (p. 154), it is said:

> "It must be admitted that, where an examination of the record shows no legal evidence to sustain a conviction, lack of jurisdiction exists" (citing 190 U. S. 1).

In *Leady* v. *U. S.*, 280 Fed. 864 (8th Cir. Ct.) the court admitted in evidence statements made by alleged co-conspirators, after commission of offense. The defendant was convicted and its judgment was reversed. It was said:

> "It is quite obvious that Leady would not and could not have been convicted if this incompetent and highly prejudicial testimony, which was mere heresay, had been excluded."

See, also,

Heard v. *U. S.*, 225 Federal, 829.
Harrington v. *U. S.*, 267 Fed. 97.

Heaton v. *U. S.*, 280 Fed. 697, where evidence that alleged bribe giver had withdrawn $1,000 from bank (in absence of defendants) was admitted by the trial court and was held to be error for which judgment was reversed.

The record in this cause presents a very exceptional case. The total failure of proof to show the guilt of Delaney, followed by his conviction, suggests a very singular situation and strongly emphasizes the necessity of guarding against the impairing of the most sacred rights of man through careless attention as to the manner or method of procedure. It may be that it will be stated

that objection to the harmful evidence, or rather, the idle and vicious hearsay which was admitted, was not specific enough. This court will, however, reverse in cases of exceptional hardship, particularly where there is no adequate proof of guilt.

In *Wieborg* v. *United States*, 163 U. S. 633, the court held that there was no adequate proof of guilt, and, although no motion was made to instruct in favor of the defendant, the judgment of conviction was reversed.

It was a grave error to admit evidence as to what alleged co-conspirators had said regarding the part Delaney is alleged to have taken. This was no part of the *res gestae*. It was purely narrative; and it must be very obvious to any inquiring mind that if such harmful and illegal matter were eliminated from the record, there would remain no evidence whatever, which could create the remotest suspicion of guilt.

An instructive case is *Clyatt* v. *United States*, 197 U. S. 207. There the accused was convicted of a violation of the statute against peonage. No motion was made to instruct the jury to find the defendant not guilty, and yet this court felt justified "in examining the question in case a plain error has been committed in a matter so vital to the defendant" (p. 222).

The indictment in that case alleged that defendant had caused certain persons to be "returned" to a condition of peonage. The proof did not show a *former* condition of peonage and failure to prove a *return* to such a condition was held fatal (p. 222).

In *Sullivan* v. *United States*, 283 Federal, 865, the verdict and judgment of conviction were held to have no basis except suspicion. The defendant had been convicted of a violation of the Anti-Narcotic Act. The Cir-

cuit Court of Appeals (Eighth Circuit) reversed defendant's conviction. It was said:

> "All the evidence, if any there was against him, was circumstantial. * * * When the record in this case is carefully read and deliberately considered, it leaves no doubt that the only real basis for the verdict and judgment, the indictment and prosecution in this case, was suspicion. * * * Fortunately, the law sternly forbids the conviction of the accused upon suspicion."

The case at bar discloses a gross violation of the constitutional right of the defendant to be confronted with the witnesses against him. If there had been a statutory provision to substitute hearsay evidence, such evidence would have been improper and inadmissible under the authority of *Kirby* v. *United States,* above referred to. Congress itself cannot sanction the violation of the Sixth Amendment by allowing the substitution of hearsay evidence in place of the sworn evidence of witnesses offered in open court, in the presence of the accused. It is manifest that Congress has no such power and it therefore must be obvious that the ruling of the trial court in admitting such evidence, and the Court of Appeals in approving of such evidence, constitute reversible error.

In Conclusion.

With all proper deference to the governmental agencies concerned in the prosecution in this case, we insist that the result attained in the conviction of Delaney is a grave judicial mistake, such as is probably unparalleled in the history of American jurisprudence. Human fallibility seems never so disastrous as in the enforcement of criminal justice which results in the abasement of an innocent young man raised in affection for his country, con-

fidence in its laws and pride in its courts. An enormous hardship and injustice has been inflicted upon Delaney wholly unwarranted by any legal evidence. We submit that, upon the record, this court should declare his conviction unsupported by the evidence, and that the judgment of the trial court and the Court of Appeals should be reversed.

Respectfully submitted,

Laurence M. Hine

Counsel for Petitioner.

No. 354

IN THE

Supreme Court of the United States

OCTOBER TERM—A. D. 1923.

THOMAS A. DELANEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO ADMIT PETITIONER TO BAIL AND TO ADVANCE THE CAUSE AND BRIEF IN SUPPORT OF MOTION.

LAURENCE M. FINE,
Attorney for Petitioner.

ELIJAH N. ZOLINE,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM—A. D. 1923.

No.

THOMAS A. DELANEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION TO ADMIT PETITIONER TO BAIL AND TO ADVANCE CAUSE.

Now comes Thomas A. Delaney, the petitioner, and moves the Court to admit him to bail pending the final disposition of the above-entitled cause by this Court on the Writ of Certiorari heretofore granted by this Court and to advance the cause for hearing, pursuant to Rule 26, §3, of this Court, for the following reasons, to-wit:

On April 20, 1922, this petitioner was sentenced by the United States District Court for the Eastern District of Wisconsin, to be imprisoned in the United States Penitentiary at Leavenworth, Kan-

sas, for the term of two (2) years, and to pay a fine of Ten Thousand ($10,000) Dollars, on two indictments charging him with conspiracy to violate the National Prohibition Act. This judgment was on a Writ of Error affirmed by the United States Circuit Court of Appeals for the Seventh Circuit, and thereupon your petitioner on June 4, 1923, applied to this Court for a Writ of Certiorari. The Writ of Certiorari was duly granted by this Court on the 11th day of June, 1923. In the meantime, on May 1, 1923, the mandate of the United States Circuit Court of Appeals for the Seventh Circuit was issued and petitioner was on or about the 7th day of May, 1923, taken in custody and incarcerated in the United States Penitentiary at Leavenworth, Kansas, where he is now confined undergoing punishment under said judgment.

In his petition for certiorari, filed in this Court, this petitioner assigned three grounds:

FIRST.—Petitioner was denied his right to be confronted by the witnesses against him as provided in Article 6 of the Amendments of the Constitution of the United States of America.

SECOND.—The hearing on appeal in this cause was before a Court constituted in violation of Section 120 of the Federal Code, in the Statutes of the United States, which provides:

> "That no Judge before whom a cause or question may have been tried or heard, in a District Court, or existing Circuit Court, shall sit on trial or hearing of such cause or question in the Circuit Court of Appeals."

THIRD.—That there was such a complete failure of proof as to amount to a loss of jurisdiction of the Trial Court.

Petitioner will rely upon each of the grounds specified in the said petition for certiorari and respectfully submits that as a matter of law he ought not to undergo the punishment imposed upon him by said judgment while his case is pending in this Court upon the writ of certiorari duly allowed by this Court.

For the foregoing reasons, as more particularly indicated in the brief accompanying this motion, your petitioner respectfully moves this Court that he may be admitted to bail pending the final disposition of his case by this Court and that the cause be advanced for hearing in this Court in accordance with Rule 26, §3, of this Court.

LAURENCE M. FINE,
Attorney for Petitioner.

ELIJAH N. ZOLINE,
of Counsel.

State of Illinois, }
County of Cook, } ss.:

Laurence M. Fine, being duly sworn, deposes and says that he is the attorney of record for the petitioner in the above entitled cause, that the foregoing motion by him subscribed was duly read by him and that the same is true to the best of his knowledge, information and belief.

LAURENCE M. FINE.

Subscribed and sworn to before me this
day of November, 1923.

Notary Public.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—A. D. 1923.

No.

THOMAS A. DELANEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF MOTION.

I.

A defendant in a criminal case is entitled to bail, as a matter of right, pending the disposition of his case in the appellate tribunal, especially if the offense for which he is held is bailable.

In *Hudson* vs. *Parker*, 156 U. S., 277, at page 285, this Court said:

> "The statutes of the United States have been framed upon the theory *that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort,* be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail,

not only after arrest and before trial, but after conviction and pending a writ of error.

"The statutes as to bail upon arrest and before trial provide that 'bail may be admitted' upon all arrests in capital cases, and '*shall be admitted*' *upon all arrests in other criminal cases;* and may be taken in capital cases by this Court, or by a justice thereof, or by a Circuit Court, a Circuit Judge or a District Judge, and in other criminal cases by any Justice or Judge of the United States or other Magistrate named. Rev. Stat. §§1014-1016" (Italics ours).

This rule should be held applicable to a writ of *certiorari.* In *Harris* vs. *Barber,* 129 U. S., 369, this Court said:

"A writ of *certiorari,* when its object is not to remove a case before trial, or to supply defects in a record, but to bring up after judgment the proceedings of an inferior court or tribunal whose procedure is not according to the course of the common law, *is in the nature of a writ of error*" (Italics ours).

II.

In general—The effect of the allowance of the writ of certiorari.

Counsel for the petitioner was unable to find any decision by this Court dealing directly with the effect of the allowance by this Court of a writ of certiorari upon the judgment to be reviewed, but the following authorities stating the common-law rule, are in point:

In *Ewing* vs. *Thompson*, 43 Pa. St., 377, Judge Strong (afterwards Mr. Justice Strong), speaking for the Pennsylvania Supreme Court, said:

> "Very many of the English as well as American authorities are collected in *Patchin* vs. *Maylor, etc.*, 13 Wend., 664. There are very many others, all holding a common-law writ of certiorari, whether issued before or after judgment, to be, in effect, a *supersedeas*. There are none to the contrary. In some of them it is ruled that action by the inferior court after the service of the writ is erroneous; in others it is said to be void, and punishable as a contempt. They all, however, assert no more than that the power of the tribunal to which the writ is directed is suspended by it; that the judicial proceedings can progress no further in the lower court" (Italics ours).

A similar expression is found in *McWilliams* vs. *King*, 32 N. J. Law, 23, where the Court in the course of its opinion, said:

> "But it is to be remembered that the writ of certiorari is of itself and *proprio vigore* a supersedeas. Neither the inferior court nor the officer holding the process of such inferior court can rightfully proceed after formal notice of its having been issued. Every act done after such notice is not only irregular, but absolutely void; and the parties doing such acts are trespassers."

See, also, 2 Hawk. P. C., pages 400-416; 1 Bac. Abr. "Certiorari," G.; Comy. Dig. "Certiorari," G.

III.

Relief should be granted by the Court.

In view of the authorities cited in Points I and II of this brief, it is submitted that the petitioner ought not to undergo punishment while his case is pending on certiorari in this Court, and as the offense for which petitioner was convicted is a bailable offense, he should be admitted to bail.

In this connection the Court's attention is respectfully called to the fact that pending the determination of the cause in the United States Circuit Court of Appeals, the petitioner's bail was fixed in the sum of Fifteen Thousand ($15,000) Dollars (Rec., 205), and that the petitioner was out on bail until he was committed to the penitentiary on the mandate of the United States Circuit Court of Appeals.

IV.

The exceptional circumstances of the case.

Petitioner insists that he is innocent and that the record discloses a total failure of competent evidence to sustain the charge against him. This is one of the important specifications of errors assigned in the petition for certiorari where the evidence against the petitioner is set forth in detail.

The other important specification of error is that Judge Evans, who sat in the United States Circuit Court of Appeals on the hearing of the writ of error was disqualified to sit on the case.

While the general rule, when this Court reverses a decision of the United States Circuit Court of

Appeals wholly on a question of jurisdiction, is to remand the case to that court without passing upon its merits, this Court in the interest of justice has the power to, and in exceptional cases does determine the merits.

Lamar vs. *U. S.*, 241 U. S., 103.

And this Court may dispose of the entire case on the merits.

Denver vs. *New York Trust Co.*, 229 U. S., 123.

To remand the case for a new hearing to the United States Circuit Court of Appeals for the Seventh Circuit would afford no remedy to the petitioner, since it would most likely be heard before two of the same Judges who already heard the case. The petitioner was entitled to have his case heard in the first instance before three Judges, qualified under the law to sit in the case. The decision was reached unanimously by the three Judges. No reflection is intended against Judge Evans. No doubt the learned Judge in acting as he did, was influenced by the best of motives. But no one can tell to what extent Judge Evans' views prevailed and affected the judgment of his associates, who sat with him in this case. In these circumstances, it is hoped that this Court will on final hearing pass upon the whole case without remanding it for hearing to the United States Circuit Court of Appeals.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the motion to admit petitioner to bail and to advance the cause for hearing ought to be granted.

Respectfully submitted,

LAURENCE M. FINE,
Attorney for Petitioner.

ELIJAH N. ZOLINE,
of Counsel

To the Honorable James M. Beck,
Solicitor General of the United States.

PLEASE TAKE NOTICE that the foregoing motion and brief in support of same will be submitted by me to the Supreme Court of the United States on the 12th day of November, 1923.

Dated, New York, October 30, 1923.

LAURENCE M. FINE,
Attorney for Petitioner.

ELIJAH N. ZOLINE,
of Counsel.

No. 354

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

THOMAS A. DELANEY,

Petitioner and Plaintiff-in-Error,

vs.

UNITED STATES OF AMERICA,

Respondent and Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR, DELANEY, ON RETURN OF WRIT OF CERTIORARI.

LAURENCE M. FINE,
Attorney for Petitioner.

ELIJAH N. ZOLINE,
of Counsel.

PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

SUBJECT INDEX.

Alphabetical Table of Cases.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

THOMAS A. DELANEY,
Petitioner and
Plaintiff-in-Error,

against

UNITED STATES,
Respondent and
Defendant-in-Error.

BRIEF IN BEHALF OF THOMAS A. DELANEY, PLAINTIFF-IN-ERROR.

Statement.

This case is now before this Court on the return of the writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit duly allowed by this Court, which Court affirmed a judgment of conviction imposed upon the plaintiff-in-error by the United States District Court for the Eastern District of Wisconsin on two indictments charging the plaintiff-in-error with others of con-

spiracy to violate the National Prohibition Act. These indictments are known in the record as Nos. 348-H and 350-H (Rec., 2-10).

Indictment No. 348-H charges the plaintiff-in-error Delaney jointly with Joseph Guidice, Joseph Dudenhoefer, Sr., Joseph Dudenhoefer, Jr. and Joseph Dudenhoefer Company, a corporation, with conspiracy to unlawfully purchase, transport, possess, barter, sell and deliver intoxicating liquors for beverage purposes in violation of the National Prohibition Act and to wrongfully make and cause to be made records, reports and affidavits in furtherance of such unlawful conspiracy.

Indictment No. 350-H is similar in tenor with indictment 348-H above described and covers the same period of time except that the name of Walter Burke is added as a co-defendant.

The overt acts alleged to have been committed by plaintiff-in-error Delaney, as recited in indictment 348-H are to the effect that he received from Joseph Guidice, co-defendant and co-conspirator at divers dates and times large sums of money in furtherance of the conspiracy.

Indictment No. 350-H sets forth similar overt acts and further charges that the plaintiff-in-error Delaney and Joseph Guidice had conversed and conferred with each other respecting unlawful transactions in intoxicating liquors.

The defendant, Joseph Guidice, died before the trial.

The defendant, Walter Burke, in indictment No. 350-H moved to quash said indictment, which motion was heard before the Honorable Evan A. Evans, a United States Circuit Judge holding a term of said District Court, and which motion was duly overruled by him (Rec., 244). See also affidavit of lawyer, ex-U. S. attorney, Rec. 247

The trial as to Walter Burke was severed. The two defendants, the Dudenhoefers, pleaded guilty.

The indictments 348-H and 350-H were by order of Court consolidated and plaintiff-in-error Delaney and the defendant, Joseph Ray, were placed on trial on March 6, 1922, before the Honorable Ferdinand A. Gieger, one of the Judges of the said District Court and a jury, resulting in a verdict of guilty on each of the aforesaid indictments. Motion for a new trial was overruled and thereafter on April 20, 1922, it was ordered that for the purpose of judgment and sentence, cases Nos. 348-H and 350-H were to be considered as one case and the plaintiff-in-error Delaney was sentenced to imprisonment in the penitentiary for the term of two years and to pay a fine of $10,000 (Rec., 32).

Plaintiff-in-error Delaney thereupon sued out a writ of error from the United States Circuit Court of Appeals of the Seventh Circuit to said District Court to review and set aside said judgment and sentence; whereupon proceedings upon the said writ of error came on for hearing on January 30, 1923, before said Circuit Court of Appeals, which said Court was composed of the Honorable Francis E. Baker, as Presiding Justice, and the Honorable Judges George T. Page and Evan A. Evans, as Associate Judges. (Rec. 216).

Thereafter on February 6, 1923, a judgment was rendered by the said United States Circuit Court of Appeals affirming the judgment and sentence of said District Court; whereupon plaintiff-in-error, in accordance with the rules of said United States Circuit Court of Appeals, filed his petition for rehearing in said United States Circuit Court of Appeals, which petition was on April 20, 1922, denied.

Whereupon plaintiff-in-error Delaney moved the said United States Circuit Court of Appeals to set aside and vacate its judgment and orders on the ground that one of the judges constituting said Court, i. e., the Honorable Evan A. Evans, was disqualified from sitting as such Associate Justice of said Court in the matter of the writ of error, as aforesaid, under Section 120 of the Federal Judicial Code (Rec., 235).

Upon the hearing of said motion, a certified copy of the record showing Judge Evans' participation in the hearing of motions and in entering judgments and orders in the Court below was produced and filed (Rec., 244); also a verified petition setting forth that Judge Evans partook in the deliberation upon the penalty to be inflicted upon the plaintiff-in-error Delaney. The verified petition and the record in the case show that the prosecution of the defendant Delaney, who was, prior to his conviction, the Federal Prohibition Director of the State of Wisconsin, is one of a series known as the "Wisconsin conspiracy cases" involving in all some twenty defendants and arising from inter-related facts, circumstances and overt acts in which it was charged that the plaintiff-in-error Delaney was involved and implicated. It appears that one Arthur Birk was placed upon trial before the said Honorable Evan A. Evans, holding a term of the District Court for the Eastern District of Wisconsin and a jury and that on April 12, 1922, a verdict was rendered finding the said Arthur Birk guilty as charged and that during the said trial the name of the plaintiff-in-error Delaney was repeatedly mentioned in a prejudicial manner (Rec., 235).

It further appears that on the 12th day of November, 1921, counsel for Walter M. Burke filed

a motion to quash indictment No. 350-H, which indictment was found against the plaintiff-in-error Delaney and said Walter M. Burke and others jointly, and being one of the indictments upon which the plaintiff-in-error Delaney was subsequently tried and convicted; that said motion came on for hearing on December 17, 1921, before said Judge Evans and was thereafter on December 22, 1921, duly denied by him (Rec., 244).

It further appears from said verified petition and record that thereafter and on or prior to the 20th day of April, 1922, and prior to the imposition of sentence upon the defendant Delaney, the said Judge Evans sat with other District Judges, to-wit, Judge Ferdinand A. Gieger and Judge Albert B. Anderson, each of whom had presided at the trials of the respective defendants named in the aforesaid indictments, and conferred and deliberated upon the penalties to be inflicted upon the plaintiff-in-error Delaney; that on the 20th day of April, 1922, said Judges proceeded to, and did, each severally pronounce sentence upon the several defendants who were tried before the said Judges respectively, including the plaintiff-in-error Delaney (Rec., 236).

Accordingly, it appears that said Judge Evan A. Evans, after having presided at the trial of Arthur Birk and after having heard, considered and denied a motion to quash indictment 350-H, upon which indictment, consolidated with indictment No. 348-H, the plaintiff-in-error Delaney was tried, and after having participated in the deliberations as to the penalty to be inflicted upon the plaintiff-in-error Delaney, is the same Judge who was one of the Judges composing the United States Circuit Court of Appeals for the Seventh Circuit sitting in

review upon the writ of error of the plaintiff-in-error Delaney.

On May 1, 1923, the said motion was duly argued before the said United States Circuit Court of Appeals and was then and there denied (Rec., 249); whereupon plaintiff-in-error Delaney duly presented his petition for certiorari in this Court, wherein after reciting the facts, he based his petition upon the following grounds:

> FIRST.—That he was denied his right to be confronted by the witnesses against him, as provided in Article 6 of the Amendment to the Constitution of the United States.
>
> SECOND.—The hearing of the writ of error in this cause was before a Court constituted in violation of Section 120 of the Federal Judicial Code providing; "that no Judge before whom a cause or *question* may have been tried or heard in a District Court, or existing Circuit Court, shall sit at a trial or hearing of such cause or question in the Circuit Court of Appeals."
>
> THIRD.—That there was such a complete failure of proof as to amount to a loss of jurisdiction of the trial Court.

All of the foregoing specifications of error are relied upon in this brief as grounds for the reversal of the judgments of the Courts below.

Statement of the Evidence.

Thomas A. Delaney was appointed Prohibition Director of Wisconsin in November, 1919, when he was about 33 years of age. He was the first prohibi-

tion director of that district. He was a resident of Green Bay, Wisconsin, since he was nine years old. He was in charge of the Permission Branch of the department (Tr., 129). *There was also an Enforcement Branch over which Delaney had no jurisdiction* (Tr., 136). His post of duty was Green Bay (Tr., 137), where he spent half of his time, spending the balance of his time in Milwaukee, excepting when he was engaged in propaganda work (Tr., 132).

After taking office Delaney became acquainted with the Dudenhoefers, who were "among the largest sacramental wine dealers in the west." O'Neil, co-appointee, Chief Inspector of the Prohibition Department, prior to his appointment had been an employe of the Dudenhoefers for fifteen years (Tr., 75). Guidice and Burke were acquainted with Delaney through their activity in Democratic politics. Ray was a prohibition inspector. It is not denied that a conspiracy existed, but we most emphatically deny that there is any competent evidence in the record showing that the plaintiff-in-error Delaney was at any time a member of the conspiracy. It appears from the record that the illegal liquor deals were accomplished by the use of forms "number 1410." Legitimately, these forms, in triplicate, were given to a vendee who would make a verified application to purchase, then have the same approved by the Prohibition Department, leaving the original with that department, retaining one copy and giving the distillery the third copy (Tr., 130). *These approvals were made by clerks with a rubber-stamp signature of the director* (Tr., 130).

The Dudenhoefers testified they had paid almost $100,000 to *Guidice* for such "coverage permits"

(blank forms 1410 bearing rubber-stamp signature of Delaney) and that Guidice told them that he had obtained these permits *not from Delaney* but from Burke, and when, Burke's price was too high (Tr., 80)—from Ray. Dudenhoefer, Jr., testifies that he went to Chicago and bought two fictitious notarial seals for the purpose of verification on the false permits. There is no evidence in the record that Delaney took part in these transactions or had knowledge of same.

The government's case against Delaney is based upon evidence of what Guidice was supposed to have said to the Dudenhoefers in the absence of Delaney to the effect that certain money given to Guidice was for Delaney, and of Delaney's friendship with Burke, Guidice and the Dudenhoefers: Letters were introduced (Plaintiff's Exhibits 31, 32, 33, 34 and 14, Rec., 179) showing the intimate friendship between Delaney and Dudenhoefers. From these letters and other evidence it appears that Delaney made certain efforts in their behalf for the legitimate release of liquor for sacramental purposes; Delaney neither asked nor received compensation for it—the latter believing it to be his duty to facilitate the legitimate use of liquor. It also appears that the Dudenhoefers, despite the friendship and the frequent meetings, never by word, hint or gesture, suggested or intimated to Delaney anything regarding money or any unlawful transaction or permit, nor did they seek to learn if he received the money supposed to have been given him by Guidice.

From the testimony it does not appear that Delaney was a necessary party to the conspiracy; and it is submitted that this raises an inference that

the supposed friendship of these parties for Delaney was a design to divert Delaney's attention away from the illegal traffic.

No witnesses were produced who testified to anything of their own knowledge respecting any of the overt acts charged against Delaney. As already stated, Joseph Guidice, a co-conspirator, who it is charged in the "overt acts" had delivered money to the plaintiff-in-error, had died before the trial. The sole testimony touching the overt acts charged against the plaintiff-in-error Delaney was that of Joseph Dudenhoefer, Sr., and Joseph Dudenhoefer, Jr., confessed co-conspirators, and one Sherman G. Spurr.

The testimony of Joseph Dudenhoefer Sr., is solely as to what Guidice had made him believe and what Guidice had said and what his son, Joseph Dudenhoefer, Jr., had said Guidice had said. Joseph Dudenhoefer, Jr., also testified as to what Guidice had told him and what another co-conspirator, Walter Burke, had told witness that plaintiff-in-error Delaney had said. Government witness Spurr testified that he was in the investment bond business and that Guidice had bought from said witness Spurr liberty bonds of the face value of $17,000 and other bonds of the face value of $11,000. This the government attempted to show was with the money supposed to have been given to plaintiff-in-error Delaney by Guidice (Rec.,).

This witness Spurr, further testifies that (Tr., 106), "he (Guidice) rather gave me to understand he was buying them for somebody else," and as to what led the witness to such an inference, he testifies that what Guidice (since deceased) had said was (Tr., 105), "He passed it off in a peculiar way

—I do not know if there was any direct statement made." And further, what Guidice said was (Tr., 105), "not anything of any serious nature; *it was more of a kidding nature.*" That is to say, when Guidice told the witness, "in a kidding nature," that he was buying the bonds for "someone else," the inference is that he was buying them for the plaintiff-in-error. It is noteworthy that no testimony was offered touching other overt acts charged against this plaintiff-in-error. The sole testimony goes to the overt act charging the plaintiff-in-error with having received money from Guidice. Both Dudenhoefer, Sr., and Dudenhoefer, Jr., testify that Guidice had told them and had made them believe that he had delivered money to the plaintiff-in-error, and particularly Dudenhoefer, Jr., testifies as to the time and place such deliveries of money to plaintiff-in-error by Guidice were made. Yet government witness Spurr gives direct evidence that Guidice bought bonds with the money supposed to have been paid to plaintiff-in-error Delaney, which is further corroborated by Plaintiff's (Government's) Exhibits 36, 37, 38 and 39.

The plaintiff-in-error, Delaney, took the witness stand and denied that he received any money from Guidice; he denied *in toto* any participation in the conspiracy. It was shown that Guidice had large sums of money (Rec., 103-106) and it is submitted that the natural inference is that he kept all moneys received from the Dudenhoefers and gave none to Delaney.

It is contended that the record reveals a total failure or proof of the existence of a conspiracy involving the plaintiff-in-error, Delaney. The government offered no other testimony relating to a con-

spiracy other than the hearsay evidence of Dudenhoefer, Sr., and Dudenhoefer, Jr., that they had been told or made to believe by Guidice, months prior to his decease, that the said Guidice had made deliveries of money to the defendant Delaney. This testimony was followed by direct evidence of government witness Spurr that Guidice, contrary to his statements to the Dudenhoefers, had bought bonds with a large portion of the money he had professed to have delivered to defendant Delaney; but that, "in a kidding nature" Guidice had intimated he was buying the bonds for "someone else." It is the contention of the government that the "someone else" was the defendant Delaney.

Brief of the Argument.

I.

From the foregoing statement of the facts, it clearly appears that the plaintiff-in-error Delaney was convicted upon statements made by a dead man, Guidice, in the absence of the plaintiff-in-error Delaney and upon the rankest kind of hearsay testimony.

The record in this cause discloses a flagrant violation of a citizen's right to be confronted with the witnesses against him. Delaney was accused and convicted upon the most palpable hearsay. The right of confrontation is recognized in every state constitution as well as the Federal constitution. It is not a mere idle form which is secured by the organic law of the land, but a real right, which courts are powerless to withhold. The first ten amendments, collectively regarded as a bill of

rights, were adopted because the people of the nation demanded security of the highest order for these rights. Not the least of the rights secured is the right to be confronted with the witnesses accusing. The rights thereby secured are the rights which our ancestors had, through suffering, finally come to enjoy, and which they did not propose should rest upon an insecure foundation. They were declared, then, to be constitutional rights, and, as such they should be jealously guarded and protected by the courts.

The right of confrontation demands that the accused shall have the opportunity to cross examine his accuser. This is the essence of the right. Deprived of the right to cross examine the accusing witness, an accused person is, in effect, condemned upon an *ex parte* proceeding.

It is well known that frequently a decisive moral effect results from the mere appearance of a witness in open court, and a defendant is entitled to the full benefit of such moral effect as may appear upon a cross examination of the witness.

An eminent former justice of this court spoke of the Sixth Amendment as conferring "among the most important rights which are guaranteed by the constitution to a person charged with offences against the United States." He then speaks of the right to be confronted with the witnesses against him and says this means that "no evidence shall be brought against him on his trial made up of depositions, or affidavits, or *hearsay statements*, but that the witnesses by whom his guilt is to be established shall be brought face to face with him in order that he may see them and hear them, witness their manner of testifying, and so that either by

himself or his counsel they may be subjected to such cross examination as he may consider of benefit to his interests."

Mr. Justice Miller on the Constitution (pages 508 and 509).

The case of *Kirby* vs. *United States*, 174 U. S., 47, involved the question as to an accused's right to be confronted with the witnesses. A Federal statute purported to make a judgment of conviction against the principal felons evidence against a person charged with receiving stolen property.

The defendant was convicted and appealed, complaining that he had been denied his right to be confronted with the witnesses against him. This court reversed the conviction and said:

> "One of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be confronted with the witnesses against him. Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the results of the trial of the principal felons was undoubtedly evidence, as against them, in respect of every fact essential to show their guilt. But a fact which can be primarily established only by witnesses cannot be proved

against an accused—charged with a different offence, for which he may be convicted without reference to the principal offender—except by witnesses who comfort him at the trial, upon whom he can look while being tried, whom he is entitled to cross examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of the innocence of an accused attends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt. * * * But that presumption in Kirby's case, was in effect held in the court below to be of no consequence; for, as to a vital fact which the government was bound to establish affirmatively, he was put upon the defensive almost from the outset of the trial by reason alone of what appeared to have been said in another criminal prosecution with which he was not connected and at which he was not entitled to be represented" (pages 55, 56).

In *Dowdell* vs. *U. S.*, 221 U. S., 325, the substance of the Sixth Amendment (as amended in the Philippine Bill of Rights) was considered. The court said:

"This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an op-

portunity of cross examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross examination" (page 330).

See also:

Mattox vs. *U. S.*, 156 U. S., 237;
Kirby vs. *U. S.*, 174 U. S., 47;
Wigmore, V. 2, 1396-1397.

In *Motes* vs. *U. S.*, 178 U. S., 458, the defendants were charged with a conspiracy to injure a citizen in the exercise of his rights. Taylor, a defendant, at preliminary hearing testified and his evidence was reduced to writing and signed by him. At the trial Taylor disappeared, just before the case was called. The written evidence of Taylor was sufficient, if accepted, to establish guilt of all defendants. The other defendants had a chance to cross examine at the preliminary hearing (see pages 470, 471). The court notes that, at time of Taylor's statement, there had been no proof of a conspiracy (page 471). The court held the admission of Taylor's statement to be a violation of the accused's rights to be confronted with the witnesses, citing Cooley Const. Lim., Sec. 218. In the instant case Guidice never was cross examined by the plaintiff-in-error, Delaney, or anyone else for the reason that he died several months before the trial.

II.

The finding of guilty, not based upon any legal evidence, is manifest error, calling for reversal.

In re Watts, 190 U. S., 1 (page 35);
Hyde vs. *Shine*, 199 U. S., 85;
Tinsley vs. *Treat*, 205 U. S., 20;
Chin Yow vs. *U. S.*, 208 U. S., 8;
Kwock Jan Fat vs. *White*, 253 U. S., 454;
Ex Parte Craig, 282 Federal, 138 (page 154).

(a) The admission of hearsay evidence was highly prejudicial to plaintiff-in-error, Delaney.

Logan vs. *United States*, 144 U. S., 263;
Brown vs. *United States*, 150 U. S., 98;
Sorenson vs. *United States*, 143 Federal, 821;
Leady vs. *United States*, 280 Federal, 864;
Heard vs. *United States*, 225 Federal, 829;
Harrington vs. *United States*, 267 Federal, 97;
Heaton vs. *United States*, 280 Federal, 697.

(b) This court will reverse, in a case of this character, although formal objection to harmful evidence may be considered as not properly made.

Crawford vs. *United States*, 212 U. S., 183;
Clyatt vs. *United States*, 197 U. S., 207;
Wiborg vs. *United States*, 163 U. S., 633;
Weems vs. *United States*, 217 U. S., 349.

(c) A state of proof consistent with innocence demands a reversal.

The record may be searched in vain for any direct evidence tending to implicate Delaney in guilt. Rumor and idle gossip have wrought the ruin of an innocent man and only the action of this court can, in a measure, restore to him the priceless boon of freedom. There is a total failure of proof to show guilt. The result would be grotesque if it were not so tragic to a man who has been made the victim of misguided official zeal upon the part of the Federal officials.

In *Leady* vs. *U. S.*, 280 Fed., 864 (8th Cir. Ct.) the court admitted in evidence statements made by alleged co-conspirators, after commission of offense. The defendant was convicted and its judgment was reversed. It was said:

> "It is quite obvious that Leady would not and could not have been convicted if this incompetent and highly prejudicial testimony, which was mere hearsay, had been excluded."

See, also,

Heard vs. *U. S.*, 225 Federal, 829;
Harrington vs. *U. S.*, 267 Fed., 97.

Heaton vs. *U. S.*, 280 Fed., 697, where evidence that alleged bribe giver had withdrawn $1,000 from bank (in absence of defendants) was admitted by the trial court and was held to be error for which judgment was reversed.

The record in this cause presents a very exceptional case. The total failure of proof to show the

guilt of Delaney, followed by his conviction, suggests a very singular situation and strongly emphasizes the necessity of guarding against the impairing of the most sacred rights of man through careless attention as to the manner or method of procedure. It may be that it will be stated that objection to the harmful evidence, or rather, the idle and vicious hearsay which was admitted, was not specific enough. This court will, however, reverse in cases of exceptional hardship, particularly where there is no adequate proof of guilt.

In *Wiborg* vs. *United States,* 163 U. S., 633, the court held that there was no adequate proof of guilt, and, although no motion was made to instruct in favor of the defendant, the judgment of conviction was reversed.

It was a grave error to admit evidence as to what alleged co-conspirators had said regarding the part Delaney is alleged to have taken. This was no part of the *res gestae.* It was purely narrative; and it must be very obvious to any inquiring mind that if such harmful and illegal matter were eliminated from the record, there would remain no evidence whatever, which could create the remotest suspicion of guilt.

An instructive case is *Clyatt* vs. *United States,* 197 U. S., 207. There the accused was convicted of a violation of the statute against peonage. No motion was made to instruct the jury to find the defendant not guilty, and yet this court felt justified "in examining the question in case a plain error has been committed in a matter so vital to the defendant" (page 222).

In *Sullivan* vs. *United States,* 283 Federal, 865, the verdict and judgment of conviction were held

to have no basis except suspicion. The defendant had been convicted of a violation of the Anti-Narcotic Act. The Circuit Court of Appeals (Eighth Circuit) reversed defendant's conviction. It was said:

> "All the evidence, if any there was against him was circumstantial. * * * When the record in this case is carefully read and deliberately considered, it leaves no doubt that the only real basis for the verdict and judgment, the indictment and prosecution in this case, was suspicion. * * * Fortunately, the law sternly forbids the conviction of the accused upon suspicion."

The case at bar discloses a gross violation of the constitutional right of the defendant to be confronted with the witnesses against him. If there had been a statutory provision to substitute hearsay evidence, such evidence would have been improper and inadmissible under the authority of *Kirby* vs. *United States*, above referred to. Congress itself cannot sanction the violation of the Sixth Amendment by allowing the substitution of hearsay evidence in place of the sworn evidence of witnesses offered in open court, in the presence of the accused. It is manifest that Congress has no such power and it therefore must be obvious that the ruling of the trial court in admitting such evidence, and the Court of Appeals in approving of such evidence, constitute reversible error.

III.

Judge Evans could not legally sit in the Court of Appeals and its judgment, as a result, is void.

Section 120 of the Federal Judicial Code.

Regina vs. *The Justices*, 6 Queens Bench, 753.

Queen vs. *Justices*, 18 Q. B., 416.

Oakley vs. *Aspinwall*, 3 N. Y., 547.

American Construction Co. vs. *Jacksonville*, 148 U. S., 372.

Cramp vs. *International Co.*, 228 U. S., 645.

Rexford vs. *Brunswick*, 228 U. S., 339.

Moran vs. *Dillingham*, 174 U. S., 153.

People vs. *Connor*, 142 N. Y., 130.

Van Arsdale vs. *King*, 152 N. Y., 69.

The verified petition of Delaney (Rec., 236) presented to the Court of Appeals (and incorporated in the transcript of the record), set forth facts, not disputed, from which it appeared that Mr. Justice Evans sat in the trial court in the consideration of matters closely related to the facts involved in the charges against Delaney. In fact, Judge Evans took part in the deliberations which resulted in the fixing of the penalties awarded the convicted persons, including Delaney. He thus became disqualified to sit in a court of review; and his disqualification became absolute, because of the prohibition of a Federal Statute, and could not depend upon any circumstances from which a waiver could be implied.

Judge Evans also heard, considered and adjudicated a motion to quash Indictment 350-H (Rec., 244). Had Judge Evans granted the motion to

quash, it would have had the effect of adjudicating the cause as to all defendants named in the indictment. The denial of said motion, likewise, was an adjudication.

Plaintiff-in-error was condemned by a court constituted in direct violation of a statute, mandatory in character.

Section 120 of the Federal Judicial Code provides:

> "That a Judge before whom a cause or *question* may have been tried or heard in a District Court, or existing Circuit Court, shall sit at the trial or hearing of such cause or *question* in the Circuit Court of Appeals."

In *Cramp* vs. *International Curtiss Co.*, 228 U. S., 645, Section 120 of the Judicial Code which prohibits a judge sitting in trial court, from sitting on hearing in Court of Appeals, was considered and it was held reversible error, although the trial judge merely entered a *pro forma* decree, without consideration of the matter.

Rexford vs. *Brunswick*, 228 U. S., 339, is to the same effect. Here the attorney for a party stated there was no objection to the trial judge sitting.

See also:

Am. Const. Co. vs. *Jacksonville*, 174 U. S., 153;
Slater vs. *Willegs*, 16 App. D. C., 369;
Moran vs. *Dillingham*, 174 U. S., 153.

In *Am. Const. Co.* vs. *Jacksonville*, 148 U. S., 372, the trial judge sat in review. The Supreme Court said:

"The more important suggestion is that the decree of the Circuit Court of Appeals is void, because Judge Pardee took part in the hearing and decision in that court, though disqualified from so doing by Section 3 of the Judiciary Act of 1891, which provides that 'no justice or judge, before whom a cause *or question* may have been tried or heard in the Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals.'

"The question whether this provision prohibited Judge Pardee from sitting in an appeal which was not from his own order, but from an order setting aside his order, is a novel and important one, deeply affecting the administration of justice in the Circuit Court of Appeals. If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or by certiorari."

The language of this court in *McClaughry* vs. *Deming*, 186 U. S., 49, in discharging upon *habeas corpus* one convicted by a court-martial, is very significant. It was held that the court-martial was constituted in violation of law, and therefore, had not the power to convict. It was said:

> *"It was therefore in law no court.* The men were disqualified to act as members thereof, and no challenge was necessary, for there was no court to hear and dispose of the challenge. It is unlike an officer who might be the subject of challenge as under some bias. A failure to

challenge in such a case might very well be held to waive the defect, and the officer could sit and the finding of the court be legal."

"But this not the case of a personal challenge of some member of the court where an objection to his sitting might be thus particularly raised. It is an objection that the whole court as a court was illegally constituted because in violation of the express provision of the statute, and the challenge to the whole court is not provided for by the statute. But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the question of invalidity. We are not of that opinion. It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. This consent could no more give jurisdiction of the court either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women. The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law. This consent had no effect whatever in the face of the statute, which prevented such men sitting on the court. The law said such a court shall not be constituted, and the defendant cannot say it may, and consent to be tried by it, any more than he could consent to be tried by the first half a dozen private soldiers he should

> meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial" (pages 65, 66). (Italics ours.)

This court then refers to the opinion in the leading case of *Oakley* vs. *Aspinwall*, 3 New York, 547, approved the principle there announced, and said:

> "A judge who is prohibited from sitting by the plain directions of the law, cannot sit, and the consent that he shall sit gives no jurisdiction. This is the doctrine of the above case. It has been followed without doubt or hesitation in the State of New York ever since its rendition in 1850" (page 68).

The sitting by Judge Evans in the Court of Appeals, after having participated in some of the proceedings in the court below, was a mistake. "Such mistakes are not uncommon," said the New York Court of Appeals (*Van Arsdale* vs. *King*, 152 N. Y., 69). "But litigants, particularly persons charged with crime, *have a right to have their case determined by a court constituted according to law.*"

The Court of Appeals has only the jurisdiction conferred by statute. Its jurisdiction was, therefore, strictly limited and placed squarely under the prohibition that no judge having heard a cause in the trial court, or "a question" arising therein, could sit in the court of review. The power of decision, in other words, was withheld from him, and effectually denied him. The Court of Appeals had no authority to render any judgment.

The plaintiff-in-error was protected by an express, mandatory provision of the statute, which denied judicial power to Judge Evans, while sitting in the Court of Appeals. Within the meaning of the opinion in *ex parte Nielsen*, 131 U. S., 176, "he was protected by a constitutional provision, securing to him a constitutional right. It was not a case of mere error in law, not a case of denying to a person a constitutional right; and where such a case appears on the record, the party is entitled to be discharged from imprisonment. * * *

IV.

The exceptional circumstances of the case require that this Court should decide every question in the case on the merits.

The plaintiff-in-error insists that he is innocent and that the record discloses a total failure of competent evidence to sustain the charge against him. This is one of the important specifications of errors assigned in the petition for certiorari.

The other important specification of error is that Judge Evans, who sat in the United States Circuit Court of Appeals on the hearing of the writ of error was disqualified to sit on the case.

While the general rule, when this Court reverses a decision of the United States Circuit Court of Appeals wholly on a question of jurisdiction, is to remand the case to that court without passing upon its merits, this Court in the interest of justice has the power to, and in exceptional cases does determine the merits.

Lamar vs. *U. S.*, 241 U. S., 103.

And this Court may dispose of the entire case on the merits.

Denver vs. *New York Trust Co.*, 229 U. S., 123.

To remand the case for a new hearing to the United States Circuit Court of Appeals for the Seventh Circuit would afford no remedy to Delaney, since it would most likely be heard before two of the same Judges who already heard the case. Delaney was entitled to have his case heard in the first instance before three Judges, qualified under the law to sit in the case. The decision was reached unanimously by the three Judges. No reflection is intended against Judge Evans. No doubt the learned Judge in citing as he did, was influenced by the best of motives. But no one can tell to what extent Judge Evans' views prevailed and affected the judgment of his associates, who sat with him in this case. In these circumstances, it is hoped that this Court will on final hearing pass upon the whole case without remanding it for hearing to the United States Circuit Court of Appeals.

CONCLUSION.

With all proper deference to the governmental agencies concerned in the prosecution in this case, we insist that the result attained in the conviction of Delaney is a grave judicial mistake, such as is probably unparalleled in the history of American jurisprudence. Human fallibility seems never so disastrous as in the enforcement of criminal justice which results in the abasement of an innocent young man raised in affection for his country, con-

fidence in its laws and pride in its courts. An enormous hardship and injustice has been inflicted upon Delaney wholly unwarranted by any legal evidence. We submit that, upon the record, this court should declare his conviction unsupported by the evidence, and that the judgments of the trial court and of the U. S. Circuit Court of Appeals should be reversed.

Respectfully submitted,

Laurence M. Fine,
Attorney for Plaintiff-in-Error.

Elijah N. Zoline,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THOMAS A. DELANEY, PETITIONER,
v.
THE UNITED STATES OF AMERICA. } No. 354.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case grows out of a widespread and aggravated conspiracy at Milwaukee, Wisconsin, to violate the National Prohibition Act, which resulted in the conviction of some thirty defendants for the conspiracy and for the bribing of various Prohibition and Revenue officers.

Petitioner was the Federal Prohibition Director for the State of Wisconsin, who had charge of the administrative and regulative branches for the enforcement of the National Prohibition Act. Defendant Ray, who was tried and sentenced with him, was an inspector in petitioner's office, having been appointed to that position by the latter. (R. 136.)

77375—23—1

On October 26, 1921, the indictments here in question were filed in the District Court for the Eastern District of Wisconsin, charging petitioner and others with conspiracy to violate the National Prohibition Act. They bear numbers 348 H and 350 H, respectively, and the defendants named therein are:

348 H—Thomas A. Delaney; Joseph Ray; Joseph Dudenhoefer, sr.; Joseph Dudenhoefer, jr.; Joseph Dudenhoefer Company, a corporation; Joseph Giudice.

350 H—Thomas A. Delaney; Joseph Ray; Joseph Dudenhoefer, sr.; Joseph Dudenhoefer, jr.; Joseph Dudenhoefer Company, a corporation; Joseph Giudice; Walter M. Burke.

Each indictment charges the defendants with having entered into a conspiracy unlawfully to deal in certain quantities of whiskey for beverage purposes and with having conspired to make false reports and records to conceal the unlawful transactions. (R. 2, 6.) The indictments contain a large number of overt acts.

Those in No. 348 H set forth the execution by Dudenhoefer, jr., of false Treasury Department permits, Form 1410, in the name of various pretended purchasers of whiskey; the sale of quantities of liquor by the Dudenhoefers; the transfer of large sums of money from the Dudenhoefers to Giudice and the division of such sums of money by Giudice with petitioner and Ray. (R. 3–5.)

The overt acts in indictment No. 350 H set forth conferences of Burke with Giudice and Dudenhoefer, jr.; the delivery by Burke to the Dudenhoefers of a

permit Form 1410; the execution by Dudenhoefer, jr., of permits Form 1410 by using the names of pretended purchasers of whiskey; the withdrawal by the Dudenhoefers of large sums of money from a bank; the transfer of large sums of money by Dudenhoefer, sr., to Giudice; the division of such sums of money by Giudice with Ray and petitioner, and the delivery of a large sum of money by Dudenhoefer, jr., to Ray. (R. 7, 10.)

The Dudenhoefers pleaded guilty to both indictments. Giudice died before the date of trial. The Government did not, at that time, proceed against the Corporation and Burke, but moved for trial against petitioner and defendant Ray.

Without objection the two indictments were consolidated for the purpose of trial. (R. 13.) Trial was had before Judge Geiger and a jury (R. 13–33), and a verdict of guilty returned against both petitioner and Ray upon each indictment (R. 15–16). Upon such verdict judgment was entered and sentence of imprisonment in the penitentiary for two years and a fine of $10,000 imposed upon each defendant, pursuant to the following order: "It is ordered by the court that for the purpose of judgment and sentence, cases number 348 Criminal H and 350 Criminal H be considered as one case." (R. 32.) Both defendants joined in a writ of error covering both cases (R. 205–213), and the cause came before Circuit Judges Baker, Evans, and Page, who affirmed the judgments, without opinion (R. 216–217). A petition for rehearing was denied. (R. 234.)

Thereupon petitioner filed a motion to vacate orders theretofore entered in the cause, upon the ground that Judge Evans was disqualified, under the provisions of section 120, Judicial Code, from sitting in the Circuit Court of Appeals, because (a) he had theretofore presided at the trial of one Arthur Birk in another, but allied, case; (b) had passed upon a motion filed by a codefendant to quash indictment 350 H found against petitioner, said codefendant and others, and (c) had taken part in the deliberations by the several judges in the trial court respecting the penalties to be inflicted upon petitioner and his codefendants. (R. 235.) The petition was denied. (R. 249.)

A petition for a writ of certiorari was subsequently granted by this court (262 U. S. 742), and the case is here on the return to that writ.

ISSUES PRESENTED.

Aside from the alleged disqualification of Judge Evans, petitioner contends his conviction should be set aside because it was based on hearsay evidence, and because there was such a complete failure of proof as to amount to a loss of jurisdiction of the trial court.

The single instance of alleged erroneous admission of hearsay evidence is found on page 77 of the record in respect to the question which Dudenhoefer, sr., was asked as to what his son told him that Giudice had said. This evidence was clearly admissible as the statement of a conspirator in respect to matters comprehended within the conspiracy, but even if not

admissible, it was unimportant and, when compared with the volume of other evidence, was not prejudicial to petitioner. The admission, even if erroneous, did not affect the rights of petitioner.

As to the matter of proof, the facts in this case so fully sustain the verdict of the jury, and the record so conclusively demonstrates the guilt of petitioner, that we assume that this court granted the writ of certiorari not because it thought petitioner was not properly convicted, but because it had some doubt as to whether the Circuit Court of Appeals was properly constituted. The Government will, therefore, confine its argument to the latter point.

ARGUMENT.

I. *Proceedings had under various indictments.*

II. *Judge Evans's action in ruling on the motion of Burke to quash did not disqualify him from sitting in the Circuit Court of Appeals on the hearing of petitioner's writ of error.*

III. *There being no question as to Judge Evans's qualification to sit in review of case 348 H, the question as to his disqualification in 350 H is moot.*

I.

Proceedings had under various indictments.

To aid the court in properly understanding the facts in this case, and in order to demonstrate the erroneous contentions of petitioner based thereon, reference is made to the series of indictments Nos. 325 H, 317 H, 322 H, 318 H, 321 H, 327 H, and 320 H, and the defendants named therein, referred to on pages 247–248 of the record.

As will be observed, these indictments were filed June 24, 1921. Petitioner was not a party to or mentioned in any of them. The indictments against him and upon which he was convicted (Nos. 348 H and 350 H now before the Court) were returned by a subsequent grand jury on October 26, 1921 (R. 1, 6), several months later than those referred to above. For convenience, the names of the defendants in the last two indictments will again be given:

No. 348 H—Thomas A. Delaney; Joseph Ray; Joseph Dudenhoefer, sr.; Joseph Dudenhoefer, jr.; Joseph Dudenhoefer Company, a corporation; Joseph Giudice.

No. 350 H—Thomas A. Delaney; Joseph Ray; Joseph Dudenhoefer, sr.; Joseph Dudenhoefer, jr.; Joseph Dudenhoefer Company, a corporation; Joseph Giudice; Walter M. Burke.

In No. 348 H no one was named as defendant who was a defendant in any of the indictments returned June 24, 1921. In No. 350 H, Walter M. Burke is the only defendant who is named in any of the indictments returned by the former grand jury in June, 1921. That the defendants in indictment No. 350 H, with the exception of Burke, are not the same as in the earlier indictments, is due to the fact that the two sets of indictments grow out of different transactions, although related to the same general conspiracy. The crimes charged in the two sets of indictments are not the same.

In each of the cases in which he was named defendant, including No. 350 H, Walter Burke filed

motions to quash the indictment. Case No. 322 H was pressed to trial and, an affidavit of prejudice having been filed against Judge Geiger, the motion to quash in that case, No. 322 H, was argued before Circuit Judge Evans, who was designated to sit in the trial court. Judge Evans denied such motion to quash and thereupon orders denying like motions were entered pro forma in each of the other cases, including No. 350 H. (R. 249.)

Petitioner was not a party defendant in case No. 322 H, *nor did he move to quash the indictment in case 350 H, and in case 348 H no question upon the indictment was raised, either prior to or during the trial, by any defendant named therein.*

The record does not support petitioner's allegation that during the trial of Arthur Birk, Judge Evans passed upon facts and circumstances which involved and implicated petitioner, or that petitioner's name was repeatedly mentioned in a prejudicial manner. (Petitioner's brief, pp. 4, 20.) On the contrary, the record shows that petitioner was not a party to or in any way involved in indictments Nos. 318 H and 321 H, in which Birk was named defendant, or in any of the other indictments returned in June, 1921.

The record also negatives the allegation that Judge Evans deliberated with District Judges Geiger and Anderson respecting the penalties to be imposed upon the several defendants, including petitioner. (Petitioner's brief, pp. 5, 20.) There is nothing whatever indicating that Judge Evans in any way

passed upon the sentence to be imposed upon petitioner. This is a bold assumption on his part relative to the subject matter of a strictly confidential and privileged conference, and the assumption is entirely unwarranted by the facts. It may be assumed that Judge Evans conferred, if at all, with respect to the punishment to be imposed upon the defendants sentenced by him, to wit, Feuer, Grosscurth, Erler, Birk, Jacobson, and Gordon (R. 236), one of whom, at least, was tried before him (R. 236), and possibly some of the others, because of the affidavit of prejudice filed against Judge Geiger (R. 249). All were parties defendant in the indictments returned in June, 1921. Petitioner was not involved in any of those indictments, but was tried and sentenced, as before stated, by Judge Geiger.

It is submitted that the record discloses a situation in which it was proper, if not absolutely necessary, in view of the extended trials, numerous defendants, and affidavits of prejudice filed, for the judges to confer respecting the sentences to be imposed upon the defendants tried before them upon indictments closely allied, but in none of which petitioner was a party or otherwise interested.

It is not clear to whom petitioner refers in his petition to vacate (R. 236) by the use of the term "said codefendants" in his allegation regarding the deliberation of the judges above referred to. But the allegation is not in accordance with the facts, whether he refers to the defendants named in indictments Nos. 318 H and 321 H returned June 24, 1921,

or to the codefendants of petitioner in indictments 348 H and 350 H. With the exception of Walter Burke, the other persons named in indictments Nos. 318 H and 321 H were not codefendants with petitioner. The codefendants of petitioner in Nos. 348 H and 350 H, other than Walter Burke, were none of them named in any of the indictments returned in June, 1921, upon the trials of which the judges petitioner refers to presided.

As above stated, a motion to quash the indictment in No. 350 H was filed by defendant Walter Burke. A similar motion to a similar indictment was argued before Judge Evans and by him denied, and thereupon like entries and orders were made in ea h of the cases in which like motions had been made, including case 350 H. (R. 249.) The only question really presented is whether such action by Judge Evans entitled the petitioner to an order vacating the orders theretofore entered by the Circuit Court of Appeals in his case.

II.

Judge Evans's action in ruling on the motion to quash did not disqualify him from sitting in the Circuit Court of Appeals on the hearing of petitioner's writ of error.

(A.)

Section 120 of the Judicial Code provides:

> No judge before whom a cause or question may have been tried or heard in the district court * * * shall sit on the trial or hearing of *such* cause or question in the circuit court of appeals.

It is conceded that a decision rendered by a court constituted contrary to this statutory provision, if not absolutely *coram non judice* and void (Freeman on Judgments, sec. 146) at least will be vacated and the cause remanded for determination before a properly constituted court. (*Moran* v. *Dillingham*, 174 U. S. 153, 158.) But the Government insists that the facts in this case do not bring it within the inhibitions of the statute.

The decisions of this court construing this statute declare that the purpose of Congress in enacting the same was to require that the circuit court of appeals be composed of judges none of whom will be required to pass upon the merits of his own rulings in the court below. The statute is meant to prohibit a judge from sitting upon the circuit court of appeals only when the appeal will require him to pass upon a question decided by him in the trial court. He is not disqualified when, as here, there is no question for review in the appellate court upon which he passed in the court below.

In *Rexford* v. *Brunswick-Balke Co.*, 228 U. S. 339, this court said (pp. 343–344):

> Its manifest purpose is to require that the Circuit Court of Appeals be composed in every hearing of judges none of whom will be in the attitude of passing upon the propriety, scope or effect of *any ruling of his own* made in the progress of the cause in the court of first instance. * * *
>
> The *sole criterion* under the statute is, does the case in the Circuit Court of Appeals

> *involve a question* which the judge has tried or heard in the course of the proceedings in the court below?

In *Moran* v. *Dillingham*, 174 U. S. 153, it is said (pp. 156–157):

> The intention of Congress * * * manifestly was to require that court to be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of first instance.

In *Case* v. *Hoffman*, 100 Wis. 314, 352, the Supreme Court of Wisconsin, of a similar statute, said (p. 352):

> It is manifestly founded upon the idea that in an appellate court the parties are entitled to have a hearing before a bench, none of whose members has previously passed upon *the matter in issue*, or upon any material part thereof.

The fact that one of the judges of the Circuit Court of Appeals sat at some stage of the case in the court below does not necessarily disqualify him. In the *Rexford* v. *Brunswick-Balke Co. case, supra*, one of the judges of the appellate court sat in the court below, but no question being raised in the appellate court upon the merits of his ruling in the trial court, it was held that he was not disqualified to act in the appellate court. He was not placed in a position of being called upon to review his own rulings and decisions. Such is the sole test, as stated by this court in that case.

Applying the decision in the Rexford case and the language used by this court therein to the facts here.

it is submitted that the record discloses that Judge Evans was not disqualified, because it clearly appears that he was not called upon in the appellate court to pass upon his own ruling denying the motion of Walter Burke to quash the indictment in case 350 H.

Petitioner and his codefendant Ray, as heretofore stated, were the only defendants tried upon indictment 350 H. After Burke's motion to quash had been denied, he dropped out of the case. So far as the record shows, Burke never brought the question raised by him upon this indictment before the Circuit Court of Appeals. As disclosed by the record, petitioner never moved to quash the indictment and never raised any question concerning it by demurrer or otherwise. Nor was any motion to quash made or demurrer filed by any defendant other than Burke. The assignments of error of petitioner and his codefendant Ray are devoid of any reference to any error of the trial court in ruling upon any motion to quash or other objection to the indictment. Indeed, no such error could be saved for review, because neither petitioner nor Ray ever raised such question in the trial court. This being true, and the appellate court, upon the writ of error, being called upon to review only alleged errors in the rulings of the trial court, how can it be seriously contended that Judge Evans, as a member of the Circuit Court of Appeals, passed upon the merits of his ruling upon the motion of Burke? On the record, petitioner never asked either the trial court or the Circuit Court Appeals to pass upon the indictment. Burke asked the trial

court for a ruling thereon, but the ruling on Burke's motion was not and could not be saved to petitioner. Had petitioner thought there was merit in Burke's motion to quash and had he desired to save that question for the appellate court, he had ample time after the ruling on such motion and before the trial of his own case to do so. (R. 1, 14, 236.)

It is therefore respectfully submitted that the case i the Circuit Court of Appeals involved no question which Judge Evans heard in the trial court, and that applying the test laid down in the Rexford case he was not disqualified.

B.

The decisions relied on by petitioner are not applicable to the facts in this case, and therefore are not controlling.

In the case of *Oakley* v. *Aspinwall*, 3 N. Y. 547, the Judge was admittedly within the prohibited degree of consanguinity to one of the interested parties.

In *Case* v. *Hoffman*, 100 Wis. 314, 352, the court discussed at length the issues involved in the decision of Judge Newman when on the circuit bench and found that he there passed upon the identical question that he reviewed on appeal as a member of the Supreme Court. The facts brought the case clearly within the statute.

In *Van Arsdale* v. *King*, 152 N. Y. 69, appeal was taken from an order denying a motion to vacate an order granting leave to sue on the ground that the

original order was irregularly issued. In the course of its opinion the court says (p. 71):

> It is thus apparent from his own statement that he was sitting in review of an order made by him.

So this case is not applicable.

In *Moran* v. *Dillingham*, 174 U. S. 153, 157–158,

> The order appointing Dillingham and Clark receivers * * * the order allowing Dillingham for his services as receiver the sum of * * * the final decree of foreclosure and sale, and the decrees for delivery of possession to the purchasers, were all made by Judge Pardee; and the appeal, in the hearing and decision of which he took part * * * involved a consideration of the scope and effect of his own order.

Clearly, the facts of this case bring it within the provisions of the statute and within the test applied in *Rexford* v. *Brunswick-Balke Co.*, *supra*.

In *Cramp & Sons* v. *International C. M. T. Co.*, 228 U. S. 645, a decree was entered on a bill in equity, and on appeal the judge entering the decree sat as a member of the Circuit Court of Appeals. It was urged that the decree was entered pro forma and without consideration of the merits, but this court held that an adjudication on the merits by the court of first instance foreclosed any contention that the merits were not considered. In this case every question before the appellate court was decided in the trial court by one of the judges who sat in the Circuit Court of Appeals. Therefore it is not controlling.

In *American Construction Co.* v. *Jacksonville Ry. Co.*, 148 U. S. 372, a question was raised as to whether this section prohibited a judge from sitting on an appeal which was not from his own order, but from an order setting aside his order. The court did not hold he was so prohibited, but granted a rule to show cause why a writ of certiorari should not issue for the purpose of determining the question. The court did not adopt the procedure that was taken in *Cramp & Sons* v. *International C. M. T. Co.*, *supra*, which was also before this court upon application for writ of certiorari, but in which case the court reviewed and remanded so that the case could be heard by a competent court. The fact that the court in the American Construction Company case did not take such procedure evidences that in its opinion the case was not within the strict letter of the statute. A judge sitting on appeal from an order setting aside his own order is not reviewing his own decision within the strict letter of the statute, yet if the order setting aside is based upon some irregularity in the original order, it is the practical equivalent thereto. But it is one thing strictly to enforce the requirements of the statute in any case which falls within its scope and an entirely different matter to enlarge the scope of the statute by construction. The whole trend of this court's decisions is to the effect that the statute only prohibits a judge from sitting in review on questions he himself has decided in the court below.

Oakley v. *Aspinwall, supra,* is a leading case and is cited in most of the decisions bearing upon the disqualification of a judge, yet in the case of *Philips* v. *Germania Bank,* 107 N. Y. 630, the same court held that a judge sitting on appeal from an order vacating an order made by him was not reviewing his own decision.

In *Rexford* v. *Brunswick-Balke Co., supra,* the judge who denied a motion to remand sat on review of the judgment in the Circuit Court of Appeals. No error was predicated upon the ruling of the judge denying the motion to remand. The case turned upon that point. The judge was held qualified. The decision demonstrates that the question is not whether one of the judges sat at some stage of the proceeding in the court below, but whether, as a member of the appellate court, he is called upon to review a question which he heard and decided in the court below.

We submit that the decision in the Rexford case is decisive of the question here presented, because although Judge Evans decided the motion of Burke as the judge who sat in the Rexford case decided the motion to remand, no error was predicated upon the ruling of Judge Evans, as no error was predicated in the Rexford case upon the order denying the motion to remand, and the Circuit Court of Appeals accordingly in this case, as in the Rexford case, was not called upon to review any order or ruling made by any of its members while sitting in the trial court.

III.

There being no question as to Judge Evans's disqualification to sit in review of case No. 348 H, the question as to his disqualification in 350 H is moot.

As above stated, petitioner was tried and convicted upon two separate indictments, Nos. 348 H and 350 H, respectively. Without objection on his part, on motion of the district attorney, the indictments were consolidated for convenience of trial. (R. 13.) A separate verdict of guilty was returned upon each indictment. (R. 15–16.) Motion for a new trial was made in each case. (R. 17.) Judgment and sentence of two years and a fine of $10,000 was imposed *in each case*. (R. 32.) While the judgment for the purpose of sentence treats both cases as one, it was so worded for the purpose of showing concurrence only, and the judgment and sentence was imposed in each case. A bill of exceptions was entitled in both cases. (R. 33.) Separate writs of error were not applied for or issued, but this irregularity apparently was waived by the appellate court.

Brown v. *Spofford*, 95 U. S. 474.

Louisville & Nashville Ry. Co. v. *Summers*, 125 Fed. 719, 720.

Waters-Pierce Oil Co. v. *Van Elderen*, 137 Fed. 557, 562.

Tosh v. *West Kentucky Coal Co.*, 252 Fed. 44, 46.

Whether or not the Circuit Court of Appeals should have considered the cases separately and rendered separate judgments, or whether it treated and dis-

posed of them as one case, the judgment rendered by it must be separately applied in the trial court.

Brown v. *Spofford, supra*, p. 485.
Myrick v. *United States*, 219 Fed. 1, 11, 13.

In case 348 H none of the defendants ever raised any question upon the indictment by demurrer, motion to quash, or otherwise. Walter Burke was not a party defendant in said action. Judge Evans never sat at any stage of the proceedings in case No. 348 H. Accordingly, there is no possibility for the application of the provisions of section 120, Judicial Code, to the hearing upon the writ of error in this case, admitting for the sake of argument that the section may be applicable to 350 H. The cases are separate and distinct, upon separate indictments, verdicts, and judgments, and the order of the Circuit Court of Appeals affirming the judgment and sentence in 348 H must stand as against any attack directed upon the judgment of that court in 350 H. The judgment and sentence of the trial court is the same in each case, to be served concurrently. The judgment and sentence in 348 H therefore remaining intact, it is idle to reconsider the case upon indictment 350 H. The question, assuming there be one, is moot.

The same rule should apply here that is applied in sentences upon several counts in the same indictment. If the judgment and sentence of the court can be justified upon any one count, it is immaterial what error was committed upon other counts. *Powers* v. *United States*, 223 U. S. 303; *Abrams* v. *United States*, 250 U. S. 616. So it is really of no moment whether the court below considered the cases sever-

ally or treated them as one case, or whether the judgment rendered by that court must be separately applied by the trial court, as stated in *Brown* v. *Spofford, supra*. If, in view of the single writ of error, the court below considered them as one case, the trial court must enter and separately apply the judgment. There being no attack, and no grounds for attack, upon the judgment in No. 348 H it must stand as entered. Again, if the court below considered them as one case, it undoubtedly could, in one judgment, have reversed on one indictment and affirmed upon the other, as it could upon separate counts in the same indictment, under the rule that if the judgment and sentence is justified upon any count of an indictment, error upon other counts is of no consequence. If, on the other hand, the court below treated the cases severally, the judgment of affirmance in No. 348 H stands in any event, and the question raised upon 350 H becomes immaterial.

Clearly, the conviction and sentence of petitioner in No. 348 H could not be entirely ignored by the court below and can not be disregarded here. Petitioner can not be heard to say that his writ of error brought up the judgment and sentence in No. 350 H and did not bring up that in 348 H. In 348 H, therefore, he stands convicted and sentenced. The sentence has been affirmed by the court below, and his subsequent proceedings there and here in no way attack the validity of the judgment affirming that sentence. In whatever light considered, the question presented is moot.

CONCLUSION.

It is, therefore, respectfully submitted that petitioner was properly convicted, that the court sustaining his conviction was properly constituted, and that the judgment should be affirmed.

JAMES M. BECK,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

MAHLON D. KIEFER,
Attorney.

DECEMBER, 1923.

○

DELANEY *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 354. Argued January 3, 1924.—Decided January 21, 1924.

1. A district judge is not disqualified by Jud. Code, § 120, from sitting in the Circuit Court of Appeals upon review of a conviction for conspiracy involving no question that had been considered by him in the District Court, merely because he had overruled a motion to quash the indictment made by a co-defendant of the plaintiff in error, who was not tried, and in another case, of like character but not involving the plaintiff in error, had overruled a like motion, presided at the trial and sentenced a defendant. P. 588.
2. Where District Court and Circuit Court of Appeals concurred in sustaining a verdict of conviction as founded on sufficient testimony, *held* that this Court would not reëxamine the question. P. 589.
3. On a prosecution for conspiracy, testimony of one conspirator as to what a deceased co-conspirator had told him during the progress of the conspiracy, is admissible against a third, in the sound discretion of the trial judge. P. 590.

Affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a conviction and sentence, in a prosecution for conspiracy to violate the National Prohibition Act.

Mr. David V. Cahill, with whom *Mr. Laurence M. Fine* and *Mr. Elijah N. Zoline* were on the brief, for petitioner.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck*, *Mrs.*

Mabel Walker Willebrandt, Assistant Attorney General, and *Mr. Mahlon D. Kiefer* were on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Certiorari to the Circuit Court of Appeals to review a judgment of that court affirming a conviction and judgment of petitioner upon two indictments in which he was charged, with others, with a conspiracy to violate the National Prohibition Act. The overt acts manifesting the conspiracy and accomplishing it were enumerated.

The indictments were numbered 348H and 350H. The defendants in No. 348 were Thomas A. Delaney; Joseph Ray; Joseph Dudenhoefer, sr.; Joseph Dudenhoefer, jr.; Joseph Dudenhoefer Company, a corporation; Joseph Guidice. The defendants in No. 350 were the same parties as above, with the addition of Walter M. Burke.

The Dudenhoefers pleaded guilty, Guidice died, and Burke was not tried. Delaney, petitioner, and Ray were alone proceeded against, the indictments being consolidated for the purpose of trial and resulting in a verdict of guilty upon which there was a judgment of imprisonment in the penitentiary for two years and a fine of $10,000 imposed.

Both defendants joined in a writ of error to the Circuit Court of Appeals, composed of Judges Baker, Evans and Page. The court affirmed the judgment without opinion.

A petition for rehearing was made by petitioner (Ray not joining), based on the ground that he was convicted upon inadmissible and uncorroborated hearsay testimony; the insufficiency of the evidence otherwise to establish his guilt, and that he was deprived of a fair trial by the attitude of the trial judge. The petition was denied.

Thereupon, a petition was filed to vacate the orders theretofore entered and to set the case for reargument.

The petition recited the fact of the indictments and the proceedings and conviction upon them, and that certain other indictments were filed charging one Arthur Birk and others with violation of the Prohibition Act, and that Birk made a motion to quash the indictment, which motion was heard, considered and denied by Evan A. Evans, one of the judges of the District Court. It was further represented that a motion was made by Walter M. Burke, a co-defendant with petitioner, to quash the indictment against him, Burke, which was also heard by Judge Evans and denied by him.

It was further represented that Birk was placed on trial before Judge Evans, found guilty and sentenced to confinement in a penitentiary and to pay a fine, and that after the proceedings thus detailed, including those against petitioner, Judge Evans sat with the other judges who had presided at the trials, and took part in their deliberations respecting the penalties to be inflicted upon petitioner and his co-defendants. That Judge Evans was also one of the judges in the imposition of penalties upon the various defendants.

It was represented that by reason of the participation of Judge Evans as thus detailed, he became and was disqualified to sit in the Circuit Court of Appeals and that the order of that court purporting to affirm the judgment of the District Court was entered without jurisdiction and was void, and that a rehearing and reconsideration of the case should have been ordered.

In support of the motion, § 120 of the Judicial Code was cited. Its provision is as follows: "That no judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals."

The section seems not to have attracted the attention or appreciation of petitioner until he had experimented with

other means of review and relief from the conviction adjudged against him. It may be that he did not thereby waive the section which may express a policy and solicitude in the law to keep its tribunals free from bias or prejudgment, rather than to afford a remedy to a litigant, yet it would seem that he should not be permitted to assume the competency of the tribunal to decide for him and its incompetency to decide against him. His action certainly suggests the idea that it was an afterthought with him that he was at any time in the situation from which the section was intended to relieve. And was he? It will be observed that the section precludes a judge or justice before whom a "cause or question may have been tried or heard" to "sit on the trial or hearing of such cause or question in the Circuit Court of Appeals." These words have received exposition in *Rexford* v. *Brunswick-Balke Co.*, 228 U. S. 339, 343-344. It is there said, "Its manifest purpose is to require that the Circuit Court of Appeals be composed in every hearing of judges none of whom will be in the attitude of passing upon the propriety, scope or effect of any ruling of his own made in the progress of the cause in the court of first instance . . . which it is the duty of the Circuit Court of Appeals to consider and pass upon." In this case there was no question before the Circuit Court of Appeals that had been considered by Judge Evans in the District Court.

The charge that Judge Evans sat with the other judges and considered with them the penalties to be imposed on the codefendants of petitioner, we do not think has justification in the record. Besides, counsel at the oral argument said he was not disposed to press it.

Petitioner attacks the judgment as not being supported by the testimony, a great deal of which is detailed. The immediate reply is that the probative sufficiency of the testimony has the support of the District Court (in which is included the verdict of the jury) and of the Circuit

Court of Appeals. It would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength—something more than this record presents.

It is contended that hearsay evidence was received against petitioner, and this is erected into a charge of the deprivation of his constitutional right to be confronted with the witnesses against him. Hearsay evidence can have that effect and its admission against objection constitute error. *Diaz* v. *United States*, 223 U. S. 442, 450; *Rowland* v. *St. Louis & San Francisco R. R. Co.*, 244 U. S. 106, 108; *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117, 130. And error is asserted and in support of the assertion there is general declamation and faultfinding with the case in its entirety. The only exception, however, was to testimony given by one of the conspirators of what another one of the conspirators (the latter being dead) had told him, during the progress of the conspiracy. We think the testimony was competent and within the ruling of the cases. *American Fur Co.* v. *United States*, 2 Pet. 358. *Nudd* v. *Burrows*, 91 U. S. 426, 438; *Wiborg* v. *United States*, 163 U. S. 632. And it has been said that the extent to which evidence of that kind is admissible is much in the discretion of the trial judge. *Wiborg* v. *United States*, 163 U. S. 632, 658. We do not think that the discretion was abused in the present case.

There is nothing in the record which justifies a reversal of the case and the judgment of the Circuit Court of Appeals is

Affirmed.